Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PULITZER PUBLISHING COMPANY,
Petitioner,

v.

THOMAS M. GODFREY, ELLIOT BLAYLOCK, JAY BLUESTONE, DONALD R. BRISCOE, BARRETT BURSTEIN, FLORISSANT NEWS, INC., RAMON DEVINE, TIMOTHY C. DEVINE, DONALD GRIESMER, RONALD KAEMMERER, FERGUSON NEWS CO., INC., FELIX KUCENAS, THOMAS J. MURPHY, ANN S. POINTER, CYRIL SALVO, NORMAN SEGALL, ROBERT STROUD, JACK R. VOGT, and HAROLD WEGGEMAN,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is competition in commerce a jurisdictional prerequisite of a Robinson-Patman Act secondary-line price discrimination case?

2. Should the Court grant certiorari to resolve the split in the Circuits created by the Eighth Circuit's disagreement in this case with the Seventh Circuit in *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973), and with the Ninth Circuit in *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pulitzer Publishing Company ("Pulitzer") hereby requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.[1/]

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 161 F.3d 1137 and are reproduced in Appendix A to this petition beginning at page A-1. The opinion of the United States District Court, Eastern District of Missouri, granting petitioner's motion to dismiss, is reproduced in Appendix D, beginning at page A-13.

JURISDICTIONAL STATEMENT

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit were filed on December 1, 1998. A timely petition for rehearing and rehearing en banc was denied on January 7, 1999 (A-12). This petition was filed within 90 days of January 7, 1999. Jurisdiction of this Court is grounded on 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), provides in relevant part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination

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[1/] Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent corporation and no subsidiaries that are not wholly-owned.

> may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Title 15 U.S.C. §15 provides in pertinent part:

> "(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Introduction

In this case, a divided panel of the Court of Appeals broke new ground and created a split in the Circuits by holding that a plaintiff in a Robinson-Patman case can maintain a claim for buyer-level, or "secondary-line," price discrimination without any showing that the recipient of the favored price and the recipient of the higher price were in competition with each other. In a 2-1 decision, the majority started off correctly by ruling that federal jurisdiction can only be invoked with regard to activities that are "in commerce" and, therefore, that at least one of the transactions being compared must cross a state line (A-6); *see Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1143-44 (5th Cir. en banc 1973). But the majority ended the jurisdictional inquiry there, without asking whether any of those sales were to buyers who were in competition with each other. The Eighth Circuit's opinion substantially undercuts the threshold jurisdictional requirement, opens the courthouse door to claims that do not

satisfy the statutory "in commerce" test, and creates a conflict with opinions from the Seventh and Ninth Circuits.

Background Facts

Respondents are a group of "branch dealers" who distribute the *St. Louis Post-Dispatch* through vending machines and retail outlets. Each branch dealer has a clearly defined service area which he deems exclusive. Hence, no branch dealer would attempt to sell newspapers in another dealer's territory. Three of the respondents have territories in Illinois, and 14 in Missouri. Respondents' Robinson-Patman claim asserts that Pulitzer (the publisher of the *Post-Dispatch*) sells papers from its Missouri plants to some of its other branch dealers at prices lower than the price charged to respondents.

Proceedings Below

Following discovery on the jurisdictional issue, the district court, addressing Pulitzer's jurisdictional motion, found that the respondent branch dealers had not established that they were in competition with the allegedly favored branch dealers. The court therefore dismissed respondents' secondary-line claims for lack of jurisdiction.

On appeal, the Eighth Circuit reversed in a 2-1 opinion. The majority first held that respondents had conceded that their sales areas are exclusive (A-2, n.2). The court also correctly noted that Robinson-Patman jurisdiction is narrower than Sherman Act jurisdiction and extends only to persons and activities that are actually "in commerce" — not to those that merely "affect" commerce (A-6), citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974). The majority then ruled, however, that the competitive status of the preferred and disfavored purchasers goes to the merits of the case rather than to jurisdiction (A-8).

The court acknowledged the contrary result reached in *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763,

769-70 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973), and labeled the Seventh Circuit's logic "somewhat seductive," but two of the three panel members chose to "resist its temptation" (A-8). Referring to the "slight basis in federal case law" for the district court's conclusion, the Court of Appeals overlooked the fact that there is *no* basis in federal case law for its own conclusion. The dissenting judge would have followed *Mayer Paving* and upheld the dismissal (A-9).

REASONS FOR GRANTING THE WRIT

The unprecedented holding below substantially waters down the heretofore rigid jurisdictional requirements of the Robinson-Patman Act and mandates a monumental waste of judicial resources over cases that should be declared jurisdictionally stillborn. Because an important and much-litigated federal statute has been construed in this manner, creating a split in the Circuits, the ruling should be reviewed by this Court.[2/]

Federal court jurisdiction is conferred by 15 U.S.C. §15 over any claim of a person "who shall be injured by reason of anything forbidden in the antitrust laws." This admittedly includes the Robinson-Patman Act, which in §2(a) makes it unlawful:

> ". . . for any person engaged in commerce, *in the course of such commerce*, either directly or indirectly, to discriminate in price between different purchasers of commodities of

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[2/] The Robinson-Patman Act has been the subject of no fewer than 26 opinions by this Court. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1989); *J. Truett Payne Co. v. Chrysler Motors, Corp.*, 451 U.S. 557 (1981); *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69 (1979); *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974); *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969); *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *F.T.C. v. Borden Co.*, 383 U.S. 637 (1966); *F.T.C. v. Sun Oil Co.*, 371 U.S. 505 (1963); *United States v. Borden Co.*, 370 U.S. 460 (1962); *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166 (1960); *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Moog Indus. v. F.T.C.*, 355 U.S. 411 (1958); *F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 61 (1953); *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951); *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948); *F.T.C. v Cement Institute*, 333 U.S. 683 (1948); *Corn Prod. Refining Co. v. F.T.C.*, 324 U.S. 726 (1945); *F.T.C. v. A.E. Staley Mfg* Co., 324 U.S. 746 (1945); *George Van Camp & Sons Co. v. American Can* Co., 278 U.S. 245 (1929).

> like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce ... where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce . . . ." 15 U.S.C. §13(a) (emphasis added).

In addition to the requirement that one of the sales being compared must cross a state line, it is undisputed that §2(a) applies only where the recipient of the favored price and the recipient of the higher price are in competition with each other. *See F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 45 (1948) (Act violated only when seller charges one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors). Hence, there can be no secondary-line violation of §2(a) where sales are made at different prices to buyers who are not competitors. *O'Byrne v. Checker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984); *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

Where, as here, the distributors of a product have exclusive territories, they do not, by definition, compete with each other, and therefore sales to them at different prices cannot possibly be said "substantially to lessen competition," as required by § 2(a). *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584-86 (2d Cir. 1987) (no reasonable juror could find competition where plaintiff had exclusive territory). In any event, as the Court of Appeals noted, respondents made no effort to show that they ever attempted to make any sales outside their own territories (A-2-3 n.2).

The language of §2(a) plainly makes the competition requirement part of the "in-commerce" jurisdictional inquiry. It prohibits discrimination "where either or any of the purchasers involved in such discrimination are in commerce" and confines "such discrimination" to those transactions which adversely affect competition. Thus, the purchases being compared must be

interstate transactions that discriminate as between competitors. It follows, too, that a purchaser who pays a higher price than someone else who does not compete with him is not "injured by reason of anything forbidden by the antitrust laws," and cannot invoke the process of the federal courts. The Seventh Circuit, focusing on the language of §2(a) itself, reached precisely this result in *Mayer Paving*:

> "It is our view that the word 'involved' when read against the underlying purpose of the antitrust laws, to protect competition, requires that only the purchases by Mayer Paving competitors and by Mayer Paving itself be considered in determining whether 'either or any' discriminatory sale is 'in commerce.'" 486 F.2d at 769.

Contrary to the impression created by the Eighth Circuit majority opinion in this case, *Mayer Paving* is not out on a limb by itself. Until the ruling below, *Mayer Paving* had been followed by every court that had considered the issue. *See Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 880-81 n.13 (9th Cir. 1982) (in analyzing jurisdiction in secondary-line case "the only relevant sales are those between the competing buyers . . . . Out of state sales made by the distributors are irrelevant in this case since they were not made to stores competing with appellants"), *cert. denied*, 460 U.S. 1085 (1983); *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1546 n.21 (N.D. Ill. 1991) (the "in commerce" jurisdictional inquiry is "limited to an examination of the defendant's sales to the victim and the victim's competitors"); *Beam v. Monsanto Co.*, 414 F. Supp. 570, 584 (W.D. Ark. 1976) (court lacks jurisdiction where no sales to plaintiff or its competitors cross state line, even though defendant sells to non-competitors in other states); *Callahan v. A.E.V., Inc.*, 1994 U.S. Dist. LEXIS 19761 at *14-15 (W.D. Pa. 1994) (dismissing claim for lack of jurisdiction where plaintiffs failed to demonstrate that sales to plaintiffs or their competitors crossed state lines).

The commentators also support the *Mayer Paving* rationale. The leading treatise by Areeda and Hovenkamp describes the jurisdictional requirement of the Robinson-Patman Act of interstate sales either to the plaintiffs or to their competitors:

> "Because the substantive test of competitive injury focuses only on the defendant's sales *to the victim and the victim's competitors*, the courts seem unanimous in demanding that at least one of these sales be in the flow of commerce, which usually means that one of them must have crossed a state line." IA P. Areeda & D. Hovenkamp, *Antitrust Law* ¶267, p. 334 (1997) (emphasis added).

Even the Federal Trade Commission agrees. *See In the Matter of International Telephone & Telegraph Corp.*, 104 F.T.C. 280, 317-18 (1984) ("In short, secondary line injury cannot be established — because the jurisdictional commerce requirement cannot be satisfied — in any relevant secondary line geographic market that does not cross state lines, because by definition favored buyers in that market do not compete with disfavored buyers in other markets").

The Eighth Circuit in this case has destroyed the unanimity previously existing on this issue and has created uncertainty and an unfortunate Circuit split. The majority opinion overlooks these additional authorities and disregards the fact that the Robinson-Patman Act addresses injuries to competition *in* interstate commerce. Where, as here, no such competition exists, the federal courts have no power to hear the case. Yet the Court of Appeals prevents the district court from disposing of this and other such meritless cases on jurisdictional grounds. Because of the importance of this question of federal law and the uncertainty created by the opinion below, this Court should grant review.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1149

Thomas M. Godfrey; Elliot Blaylock; Jay Bluestone; Donald R. Briscoe; Barrett Burstein; Florissant News, Inc., a Missouri Corporation; Ramon Devine; Timothy C. Devine; Donald Griesmer; Ronald Kaemmerer; Ferguson News Co., Inc., a Missouri Corporation; Felix Kucenas; Thomas J. Murphy; Ann S. Pointer; Cyril Salvo; Norman Segall; Robert Stroud; Jack R. Vogt; Harold Weggemen,

Appellants,

v.

Pulitzer Publishing Company, a Corporation,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: June 11, 1998
Filed: December 1, 1998

Before HANSEN and MURPHY, Circuit Judges, and DOTY,[1] District Judge.

HANSEN, Circuit Judge.

Appellants brought an action pursuant to Section 2(a) of the Robinson-Patman Price Discrimination Act ("the Act"), 15 U.S.C. § 13(a) (1994), claiming that Pulitzer Publishing Company ("Pulitzer") engaged in illegal discriminatory sales of the *Saint Louis Post-Dispatch* newspaper ("the *Post Dispatch*"). On

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota, sitting by designation.

Pulitzer's motion, the district court dismissed the action for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Because we conclude the district court erred in its jurisdictional analysis, we reverse and remand.

I.

Pulitzer publishes the *Post-Dispatch* and distributes it by three primary methods. First, Pulitzer distributes newspapers for sale in vending machines and at retail outlets through independent contractors known as "branch dealers" or "branchmen." Second, Pulitzer sells newspapers to a network of independent carriers who then resell the papers to home subscribers. Finally, Pulitzer sells a limited number of newspapers to direct subscribers. This appeal involves the first method of distribution — sales via branch dealers.

Appellants are 17 of the roughly 37 branch dealers in the St. Louis area. Three of these 17 branch dealers operate in Illinois; 14 are based in Missouri. The 20 remaining branch dealers operate in either Missouri or Illinois. None of the 37 operate in both Missouri and Illinois. Pulitzer prints the *Post Dispatch* in Missouri and then ships copies across the Mississippi River to Illinois for resale by the branch dealers located in that state.

Under this distribution method, the branch dealers purchase newspapers from Pulitzer and then resell them to retail outlets (newsstands, convenience stores, supermarkets, etc.) and via vending machines located within their service area. Each branch dealer operates within a clearly defined service area. Further, the branch dealers have historically recognized these service areas as being exclusive territories and appear to respect the historic boundaries between service areas.[2]

[2] Pulitzer asserts that while this exclusivity is not contractually mandated, the branch dealers operate as though the service areas are exclusive. (Appellee's Br. at 1-2.) We think that it is fair to say that appellants have conceded this

(Footnote 2 continued on next page)

As filed with the district court, the complaint included 19 counts, each count alleging a violation of Section 2(a) of the Act, 15 U.S.C. § 13(a). Of these 19 counts, only Count I remains at issue. In Count I, appellants sought an injunction against Pulitzer based on an allegedly discriminatory pricing scheme. Specifically, appellants asserted that Pulitzer violated the Act by selling the *Post-Dispatch* to certain branch dealers at a lower price than Pulitzer sold the newspapers to appellants. Section 2(a) of the Act provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are *in commerce*, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

Id. (emphasis added).

Courts and commentators compartmentalize Robinson-Patman claims into three types of violations. First, "[a] primary-line violation occurs where the discriminating seller's price discrimination adversely impacts competition with his — the seller's — competitors." *Best Brands Beverages, Inc. v. Falstaff Brewing Corp.* 842 F.2d 578, 584 n.1 (2d Cir. 1987) (citations

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(Footnote 2 continued)

point. We have found nothing in their briefs or other papers indicating that appellants disagree with Pulitzer's characterization. Further, in their initial brief filed with this court, appellants both illustrated and discussed the boundaries between each branch service area without suggesting that any branch dealer ever disregarded these boundaries.

omitted). "[A] secondary-line violation occurs where the discriminating seller's price discrimination injures competition among [the seller's] customers. . . ." *Id.* Finally, a tertiary violation occurs when, although "the purchasers of the discriminating seller did not compete directly, their customers competed within a unified market region." *Id.*

Appellants claim that Pulitzer's price discrimination harms competition between branch dealers. Thus, they claim a secondary-line violation. In particular, appellants alleged and Pulitzer admitted that Pulitzer reduced the price it charged certain branch dealers while continuing to charge appellants a relatively higher price. (Appellants' App. at 148, 167.) In this context, we refer to those branch dealers receiving the lower price as "favored branch dealers," and refer to the appellants as "disfavored branch dealers." *Cf. Best Brands*, 842 F.2d at 584.

Pulitzer filed a motion to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The district court granted discovery for the limited purpose of determining the existence of jurisdiction. At the close of this discovery period, the court concluded that the appellants satisfied the Act's "in commerce" requirement. Despite this conclusion, the court dismissed the appellants' claim for lack of subject-matter jurisdiction because the appellants failed to provide sufficient evidence that the favored and disfavored branch dealers compete for sales. Appellants appeal the dismissal of Count I.

II.

Appellants argue three issues on appeal. First, appellants claim that *jurisdiction* under Section 2(a) of the Act does not depend on a competitive relationship between favored and disfavored buyers. Second, appellants contend that even if such a jurisdictional requirement exists, they sufficiently demonstrated a competitive relationship between the branch dealers. Finally, appellants argue that in any event, the competitive

relationship issue is so intermeshed with the merits that it should be resolved only after a full trial. We agree with appellants — jurisdiction under Section 2(a) does not require a showing of a competitive relationship — therefore, we do not reach the second and third arguments.

The district court held that it lacked subject-matter jurisdiction because the appellants failed to show a competitive relationship between the favored and disfavored branch dealers. Implicitly, therefore, the court concluded that such a relationship was a jurisdictional prerequisite under the Act. Such a conclusion presents a question of law which we review de novo. *See United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997) (reviewing subject-matter jurisdiction and statutory interpretation de novo), *cert. denied*, 118 S. Ct. 1200 (1998). Our review of the district court's fact-findings is governed by the principles laid out in *Osborn v United States*, 918 F.2d 724 (8th Cir. 1990). In *Osborn*, we held that a district court has power to decide issues of disputed fact when ruling on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. *Id.* at 729. "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." *Id.* (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)). When, as in this case, the district court relies "on its own determination of disputed factual issues, [we] review those findings under the 'clearly erroneous' standard." *Id.* at 730 (citing *Williamson*, 645 F.2d at 413).

Federal courts are courts of limited jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan* 111 U.S. 379, 382 (1884)) (alteration in original). It is with these principles in mind that we undertake to ascertain the requirements of subject-matter jurisdiction in the instant case.

Unlike other federal antitrust legislation, namely the Sherman Act, jurisdiction under the Robinson-Patman Act is relatively narrow and "extends only to persons and activities that are themselves 'in commerce.'" *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974). Jurisdiction under Section 2(a) of the Robinson-Patman Act is not established "merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." *Id.* at 195 (emphasis added). "With almost perfect consistency, the Courts of Appeals have read the language requiring 'either or any of the purchases involved in such discrimination (be) in commerce' to mean that § 2(a) applies only where 'at least one of the two transactions which, when compared, generate discrimination . . . cross(es) a state line.'" *Id.* at 200 (quoting *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972)) (alterations in original).

Thus, the plain language of Section 2(a), and the cases interpreting that section, clearly establish the jurisdictional nature of the Act's unique "in commerce" requirement. The district court was correct to address this issue as a threshold matter in determining its jurisdiction. *See Steel Co.*, 118 S. Ct. at 1012. The district court found that because Pulitzer's sales to branch dealers in Illinois crossed a state line, the appellants satisfied the interstate commerce requirement. We cannot say such a finding is clearly erroneous. Indeed, we agree. *See Osborn*, 918 F.2d at 730. Therefore, we affirm the district court in this respect.

We find more troubling the district court's conclusion that appellants' satisfactory showing on the "in commerce" issue did not end the jurisdictional inquiry. According to the district court, appellants must also demonstrate a competitive relationship between the favored and disfavored branch dealers. The plain language of Section 2(a) suggests to us, however, that any inquiry into competition or into competitive relationships, tests

and goes to a plaintiff's prima facie case, and not to jurisdiction.[3] And, as the Supreme Court recently reiterated, federal courts do not lose jurisdiction on the mere possibility that a plaintiff's averments fail to state a cause of action. *Steel Co.*, 118 S. Ct. at 1010 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

Our conclusion is strengthened by a review of the cases the district court cited as establishing a competitive relationship as a jurisdictional requirement. In *Best Brands*, for example, the Second Circuit held that a prima facie violation of the Act was not shown in the absence of actual competition. 842 F.2d at 586. To be sure, the Second Circuit left no doubt that a plaintiff in a secondary-line case must be able to "prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s)." *Id.* at 584. All of this, however, was in the context of reviewing the denial of a directed verdict after a jury trial. *Id.* at 581. At no point did the court attribute a jurisdictional quality to this competitive relationship requirement. To the contrary, the court viewed this issue as relating to a plaintiff's prima facie case. *Id.* at 586.

The remaining cases the district court relied on lead to the same conclusion. In *White Industries Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687 (W.D. Mo. 1986), *aff'd*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 488 U.S 856 (1988), the court found that favored and disfavored purchasers must compete in both a geographical and functional sense. *Id.* at 703. *White Industries*, however, was a case tried to the court and decided at the close of

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[3] We deliberately avoid the long, and ultimately fruitless, inquiry into the legislative history of the Robinson-Patman Act. "The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusually difficult to decipher." *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 767 (7th Cir. 1973) (citations and quotations omitted), *cert. denied*, 414 U.S. 1146 (1974). "This is particularly true of the phrase requiring one of the sales to be 'in commerce.'" *Id.*

plaintiffs' evidence. Further, the district court in *White Industries* did not treat this issue as a jurisdictional matter. In *Stelwagon Mfg. Co. v. Tarmac Roofing*, the Third Circuit also treated the competitive relationship issue as an element of a plaintiffs prima facie case, and not as a jurisdictional prerequisite. *See* 63 F.3d 1267, 1271 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996). Based on the foregoing, we think the district court erred in treating the competitive relationship issue as a threshold jurisdictional question.

While one might argue that the competitive relationship issue reflects an inherent aspect of the "in commerce" jurisdictional requirement, and not a separate jurisdictional hurdle, we find no basis in the language of the statute, and only a slight basis in federal case law, for reaching this conclusion. In fact, the only meaningful authority for such a conclusion comes from a single case. In *Mayer Paving*, the Seventh Circuit stated that "[o]nly those purchases which might injure competition are 'involved' [in commerce] under the Robinson-Patman Act." 486 F.2d at 769. The court characterized the question as being "an analogue to standing," and concluded that "a customer has standing only to raise and compare those sales which are injurious to his competition." *Id.* at 770.

While we find the logic of *Mayer Paving* somewhat seductive, we nonetheless resist its temptation. We think that the effect on competition and the competitive status of the preferred and disfavored purchasers are elements of the cause of action and go more to the merits of the appellants' case than to jurisdiction. In reaching our conclusion we are also mindful of the Court's recent admonition that "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not involve a federal controversy.'" *Steel Co.*, 118 S.

Ct. at 1010 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

We hold, therefore, that appellants need not *prove* a competitive relationship between allegedly favored and disfavored buyers in order to establish subject-matter jurisdiction. It may be that appellants will be unable to prove any competitive relationship, and consequently, no competitive harm. Those shortcomings of proof, however, do not deprive the district court of jurisdiction — that is its power — to hear the case. Moreover, while the district court made findings of fact on this issue based on conflicting evidence, we choose not to pass judgment on those findings. Should the issue of a lack of a competitive relationship between favored and disfavored branch dealers present itself in the future, for example as part of a motion for summary judgment, the district court would then review the evidence under a different standard. *See Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 342-43 (8th Cir. 1995).

III.

In summary, we hold that the narrow "in commerce" jurisdictional requirement for a secondary-line claim under Section 2(a) of the Robinson-Patman Act does not also require that the favored and disfavored buyers stand in a competitive relationship. The existence of such a competitive relationship is simply an element of a plaintiffs prima facie case. Therefore, we reverse the district court's order dismissing Count I of appellants' suit and remand the case for further proceedings in accordance with this opinion.

DOTY, District Judge, dissenting.

I respectfully dissent. Although I agree that the analysis of Section 2(a) jurisdictional requirements does not require a separate finding of "in commerce" and a "competitive relationship" between the preferred and disfavored purchaser, I am willing to

be seduced by *Mayer Paving* to the extent that it holds that a competitive relationship is a necessary element of the "in commerce" jurisdictional requirement, and because the lower court found that element lacking, would affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1149EMSL

Thomas M. Godfrey; Elliot Blaylock; Jay Bluestone; Donald R. Briscoe; Barrett Burstein; Florissant News, Inc., a Missouri Corporation; Ramon Devine; Timothy C. Devine; Donald Griesmer; Ronald Kaemmerer; Ferguson News Co., Inc., a Missouri Corporation; Felix Kucenas; Thomas J. Murphy; Ann S. Pointer; Cyril Salvo; Norman Segall; Robert Stroud; Jack R. Vogt; Harold Weggemen,
Appellants,
vs.
Pulitzer Publishing Company, a Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

December 1, 1998

A true copy.
Attest: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1149EMSL

Thomas M. Godfrey, et al.,
Appellants,
vs.
Pulitzer Publishing Company, etc.,
Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 7, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-1605 (CEJ)

THOMAS GODFREY, et al.,
Plaintiffs,

v.

PULITZER PUBLISHING CO.,
Defendant.

MEMORANDUM AND ORDER

[Filed: Oct. 10, 1997]

This matter is before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction [Doc. 16]. Plaintiffs have filed a response in opposition to the motion.

Plaintiffs bring this action pursuant to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). They claim that defendant Pulitzer Publishing Co. ("Pulitzer") engaged in anticompetitive sales of its newspaper, the St. Louis Post-Dispatch ("Post-Dispatch").

Pulitzer sells the Post-Dispatch under three methods. First, Pulitzer sells newspapers to "branch dealers" who then resell the newspapers at certain vending machines and retail outlets. Second, Pulitzer sells newspapers to "independent carriers who then resell the newspapers to home subscribers. Third, Pulitzer sells newspapers directly to home subscribers.

Plaintiffs, all of whom are branch dealers, claim that Pulitzer discriminates against them by selling newspapers at a lower cost to other branch dealers (Count I), to independent carriers (Count

II), and to home subscribers (Count III). In response, defendant Pulitzer asserts that the sales in question do not meet the "in commerce" jurisdictional requirement of the Robinson-Patman Act. Further, defendant claims that there is no showing that the allegedly discriminatory sales are made to competitors of plaintiffs.

Section 2(a) of the Robinson-Patman Act provides:

> It shall be unlawful for any person engaged in commerce, **in the course of such commerce**, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, **where either or any of the purchases involved in such discrimination are in commerce**, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a) (emphasis added). Claims under the Robinson-Patman Act may be brought as a primary line violation "where the discriminating seller's price discrimination adversely impacts competition with his — the seller's — competitors." *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 n.1 (2d Cir. 1987). Claims may also be brought as a secondary line violation "where the discriminating seller's price discrimination injures competition among his customers, i.e. purchasers from him." *Id.*

The "in commerce" jurisdictional requirement of section 2(a) of the Robinson-Patman Act is not established merely by proving that the sales "affect commerce." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974). Rather, the plaintiff must establish that "at least one" of the "discriminatory sales was made in interstate commerce." *Id.* To show the existence of an

interstate discriminatory sale, the plaintiff may rely on the "flow of commerce doctrine." *White Indus., Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687, 699 (W.D. Mo. 1986), *aff'd*, 845 F.2d 1497 (8th Cir. 1988). The flow of commerce doctrine provides that "if the movement of those goods is intended or expected to cross a state line," the sale is interpreted as an interstate sale. *Id.*

Further, plaintiffs must show the existence of competition, either by evidence that (1) they are competitors of the discriminating seller in primary line claims or (2) that they are competitors of the favored purchaser in secondary line claims. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220-21 (1993) (primary line claim); *Bathke v. Casey's Gen'l Stores, Inc.*, 64 F.3d 340, 343-44 (8th Cir. 1995) (primary line claim); *White Indus.*, 657 F. Supp. at 703 (secondary line claim); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995) (secondary line claim), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1264 (1996); *Best Brands*, 842 F.2d at 584 (secondary line claim).

1. Secondary Line Claims

Count I of the present action alleges that other branch dealers were "favored" by being allowed to purchase the Post-Dispatch at a lower cost. With respect to the interstate commerce jurisdictional requirement, plaintiffs must show either that at least one sale to a plaintiff was an interstate sale or at least one sale to a favored branch dealer was an interstate sale. In support of their claims, plaintiffs have included an exhibit purporting to show that the plaintiff branch dealers are located in both Missouri and Illinois. Defendant does not dispute that certain plaintiff branch dealers are located in Illinois. Therefore, because the movement of goods, *i.e.*, Post-Dispatch newspapers, is "intended or expected to cross a state line," from Missouri to Illinois, the plaintiffs have satisfied the interstate commerce requirement. *White Indus.*, 657 F. Supp. at 699.

Plaintiffs, however, do not provide sufficient evidence in Count I showing that the allegedly favored branch dealers are competitors. Plaintiffs and the favored purchaser must be competitors in the "same geographic market area" and at the "same functional level in the distribution system for the commodity." *White Indus.*, 657 F. Supp. at 703; *Best Brands*, 842 F.2d at 585. Defendant asserts that there is no showing of geographic competition. Several factors may be considered in order to determine whether two purchasers are competing in the same geographic area: physical barriers separating trade zones, closeness between the distributors' customers, "keenness of competition," low profit margins, "price is a significant factor," or a "reasonable possibility that customers would be likely to cross over from one area to another." 3 Von Kalinowski, Sullivan, & McGuirl, *Antitrust Laws and Trade Regulation* § 39.02[2], p. 39-25 (2d ed. 1997). Defendant claims that branch dealers have exclusive service areas and do not compete with each other. However, under the factors cited for determining geographic area, exclusivity would not necessarily prevent competition. For example, if customers located in a plaintiff's branch service area are likely to buy the Post-Dispatch in another branch service area, the two branch dealers may be viewed as competitors.

Plaintiffs do not identify the names and locations of any favored branch dealer, except for Joseph Eisenbath. They only state that there are favored branch dealers in Missouri and Illinois. Even with respect to Mr. Eisenbath, plaintiffs merely allege that he distributes the Post-Dispatch in Missouri and "in the vicinity of Alton, Illinois." Plaintiffs do not submit any evidence showing more precisely where his branch dealer service areas are located. Further, plaintiffs submit general evidence, including statistics regarding commuting patterns, purporting to show how residents in Missouri and Illinois routinely cross the state border to buy the Post-Dispatch. However, this general evidence cannot be linked to the favored branch dealers

because their specific locations have not been shown by plaintiffs. As a result, the record does not contain sufficient evidence to determine whether the plaintiff branch dealers and the favored branch dealers are in fact competing in the same geographic area.

The Court concludes that plaintiffs have not fulfilled their burden of proof that subject matter jurisdiction exists. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir 1990). Plaintiffs were given an opportunity to obtain discovery relating to the jurisdiction issue but they have not submitted sufficient evidence to establish the Court's jurisdiction. As such, defendant is entitled to dismissal of Count I.

The Court will also dismiss Count II in which the plaintiffs claim that certain independent carriers pay less for issues of the Post-Dispatch. However, similar to the favored branch dealers in Count I, the favored independent carriers are not identified by name or location of their respective service areas. As such, the Court cannot determine whether the favored carriers are competitors of the plaintiffs, and plaintiffs have not proved that subject matter jurisdiction exists.

2. Primary Line Claim

Finally, the Court finds that the defendant is entitled to dismissal of Counts III through XIX. In these counts, each plaintiff branch dealer claims that subscribers pay less for the Post-Dispatch. As discussed above, plaintiffs in a primary line claim must show that they are competitors of the discriminating seller. The Court finds that the facts of this action are analogous to those of an Eighth Circuit decision where no competition was found to exist. *Conoco, Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895 (8th Cir. 1985), *cited in* 3 Von Kalinowski, Sullivan, & McGuirl, *Antitrust Laws and Trade Regulation* § 39.02(3), p. 38-13 (2d ed. 1997). In *Conoco*, an oil distributor purchased oil from the manufacturer and resold the product to consumers. *Id.* at 897. The manufacturer also sold oil directly to customers but at a

lower price. *Id.* at 897-88. As a result, the distributor claimed that it was a competitor of the manufacturer and suffered from a primary line violation of the Robinson-Patman Act. *Id.* at 901-02. The Eighth Circuit held that the manufacturer and the distributor were not competitors. *Id.* Even if the manufacturer offered the same price to the distributor and the customers, the distributor "could not have successfully competed . . . [because) it would have had to charge more for the gasoline than it paid defendant [the manufacturer] in order to cover expenses and make a profit." *Id.* at 903. Therefore, the existence of any price discrimination could not have affected competition. *See id.*

In this action, Pulitzer is a manufacturer of the Post-Dispatch and sells issues of the newspaper directly to subscribers. The branch dealers are distributors because they purchase the Post-Dispatch from Pulitzer and resell to customers. Applying the analysis used in the *Conoco* decision to the analogous fact of this case, even if Pulitzer offered the same price to the plaintiffs and subscribers, the plaintiffs would have to charge a higher resale price to "cover expenses and make a profit." *Conoco*, 774 F.2d at 903. The plaintiffs and Pulitzer cannot be considered to be competitors. *Id.* Because plaintiffs do not establish that Pulitzer is a competitor, they fail to prove that the Court has subject matter jurisdiction over the primary line claims in Counts III through XIX.[1]

---

[1] This Court recognizes that the Eighth Circuit has held that competition can exist between a wholesaler and a manufacturer. *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987), *cited in* 3 Von Kalinowski, Sullivan, & McGuirl, *Antitrust Laws and Trade Regulation* § 39.02[3], p. 38-14 (2d ed. 1997). However, in *Henry*, the plaintiff "presented evidence that it was a very substantial if not Chloride's only real competitor in the route-distribution market." 809 F.2d at 1343; Von Kalinowski at 38-14. Therefore, plaintiff had the ability to compete despite the price disadvantage. *Id.* In this action, the plaintiff branch dealers have not presented evidence identifying the name or

(Footnote 1 continued on next page)

For the reasons stated above,

IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED** [Doc. 16].

IT IS FURTHER ORDERED that this action is **DISMISSED** for lack of subject matter jurisdiction.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 10th day of October, 1997.

(Footnote 1 continued)

location of subscribers receiving the price discount. Therefore, to the extent that *Henry* undercuts the holding of the *Conoco* decision, this Court distinguishes the facts of the *Henry* decision from the present action. The Court has insufficient information to conduct an examination into the state of competition, if any, between the plaintiffs and Pulitzer.

Supreme Court, U.S.
FILED
MAR 30 1999
OFFICE OF THE CLERK

No. 98-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PULITZER PUBLISHING COMPANY,
Petitioner,

v.

THOMAS M. GODFREY, ELLIOT BLAYLOCK, JAY BLUESTONE, DONALD R. BRISCOE, BARRETT BURSTEIN, FLORISSANT NEWS, INC., RAMON DEVINE, TIMOTHY C. DEVINE, DONALD GRIESEMER, RONALD KAEMMERER, FERGUSON NEWS CO., INC., FELIX KUCENAS, THOMAS J. MURPHY, ANN S. POINTER, CYRIL SALVO, NORMAN SEGALL, ROBERT STROUD, JACK R. VOGT, AND HAROLD WEGGEMAN,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Background Facts

Petitioner's statement of the facts is one-sided and incomplete. Branch dealers sell newspapers at retail in vending machines. Anyone who passes a vending machine on the way to or from work, while shopping, or otherwise traveling throughout the Greater St. Louis Metropolitan Area is a potential customer for the branch dealer whose territory he or she passes through or works in, regardless of where the potential customer resides. There are roughly 2,000 St. Louis Post-Dispatch vending machines in the area through which the branch dealers sell their newspapers. Thus, all of the 2,500,000 residents of the Greater St. Louis Metropolitan Area are potential customers of each branch dealer. Records maintained by Petitioner concerning customers who have lost money in malfunctioning vending machines demonstrate that a significant number of newspapers are purchased by customers who reside outside of the branch in which they purchase their St. Louis Post-Dispatch newspapers.

Proceedings Below

Petitioner utilizes its Statement of the Case to argue the merits of its position when it represents to this Court that the Eighth Circuit "overlooked the fact there is *no* basis in federal case law for its own conclusion." (Petition 4.) (emphasis added). It is Respondents' understanding that the Petitioner's Statement of the Case is supposed to be a neutral and unbiased recitation of the proceedings below, and is not the appropriate section of the Petition for argument.

REASONS FOR DENYING THE WRIT

It is Petitioner's position that, in order to establish subject-matter jurisdiction for a civil claim for violations of § 2(a) of the Robinson-Patman Act, a plaintiff must prove that: (1) defendant has sold a product to different purchasers at different prices; (2) at least one of the sales being compared took place in interstate commerce; and (3) the favored purchasers compete with the plaintiff. Petitioner's position is supported by *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); it was rejected by the court below.

Petitioner states that "[t]he Eighth Circuit in this case has destroyed the unanimity previously existing on this issue . . . ." (Petition 8.) This is a gross misrepresentation.

Petitioner lists 26 cases in which this Court has interpreted the Robinson-Patman Act. (Petition 5 n.2.) These cases occupy 592 pages of the official reporter. These pages may be scanned in vain for any support for Petitioner's "unanim[ous]" proposition of law.[1] There is not even a hint in any of the majority, plurality, concurring, or dissenting opinions in these cases that proof of competition between favored and disfavored purchasers is a prerequisite for exercise of subject-matter jurisdiction in cases alleging price discrimination in violation of § 2(a) of the Robinson-Patman Act. It seems beyond belief that, if Petitioner's position was universally accepted, as Petitioner claims, it would not have received at least a passing mention by some member of this Court at some time in the past eighty-five years.[2]

---

[1] In fact, there is a *dictum* in one of the cases cited by petitioner, *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960), which supports the Eighth Circuit's decision. See p. 8 *infra*. *Also cf. Corn Prod. Refining Co. v. FTC*, 324 U.S. 726, 745 (1960).

[2] The Robinson-Patman Act is a revision of § 2 of the Clayton Act, but the pertinent language regarding jurisdiction was not altered.

Nor is this purportedly "unanim[ous]" jurisdictional prerequisite found in the words used by Congress, which made it unlawful "for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers . . . where either or any of the purchasers involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." 15 U.S.C § 13(a). This Court has interpreted this to mean that Congress intended to limit its exercise of its power under the commerce clause to situations where at least one of the sales to a favored purchaser, or one of the sales to a disfavored purchaser, crossed a state line. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). The statute does not say "competing purchasers" or "competitors." *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266, 267 (D. Colo. 1964); *see Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 354 (E.D. Wis. 1979); *see also Bowen v. New York News, Inc.*, 366 F. Supp. 651, 681 (S.D.N.Y. 1973), *rev'd on other grounds*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976).

In contrast to the single commentator cited by Petitioner for "the unanimity existing on this issue," there are at least three commentators who have listed the "jurisdictional requirements" for § 2(a) price discrimination treble damage claims, none of whom have included "sales to competitors" in their lists. Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 21.2 at 145 (1983); Daniel J. Baum, *The Robinson Patman Act* 6-14 (1964); Hugh C. Hansen, *Robinson-Patman Law: A Review*, 51 FORDHAM L. REV. 1113, 1125-33 (1983).

None of the three district court opinions relied on by Petitioner to create the "unanimity previously existing on this issue" supports Petitioner's position. *Ashkanazy v. I. Rokeach & Sons,*

Inc., 757 F. Supp. 1527 (N.D. Ill. 1991), is a primary line case, with plaintiff and defendant being competitors. In such a case, it makes no difference whatsoever whether any favored or disfavored purchasers compete. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 545-46 (1960); *see Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

In Petitioner's second district court case, *Beam v. Monsanto Co.*, 414 F. Supp. 570 (W.D. Ark. 1976), the *Beam* plaintiffs purchased oil for the manufacture of asphalt cement from Monsanto and used the resulting asphalt to repair and resurface highways in Arkansas. Monsanto sold the same oil to Madden Contracting Company of Louisiana "for use in Louisiana on entirely different projects in which the plaintiffs had no interest[,]" at a lower price. *Id.* at 581, 584. There were no retail customers involved. The case is factually not comparable to the instant case.

Petitioner's final district court support for its "unanimity" statement is *Callahan v. A.E.V., Inc.*, 1994 WL 682756 (W.D. Pa. 1994). In that case, the court held that: "A prerequisite to establishing secondary line injury is that the *favored and disfavored customers must be competing in the same geographic and product markets*, . . . and therefore only the sales to competing buyers are relevant for jurisdictional purposes." *Id.* at 3 (emphasis added). It is incontestable that the Greater St. Louis Metropolitan Area is a single geographic market for the sale of daily newspapers at retail, and that all of the favored and disfavored branchmen sell their newspapers within that market.

Petitioner's five judicial authorities, and professors Areeda and Hovenkamp, cite *Mayer Paving* for the proposition that sales to competitors are a jurisdictional requirement for § 2(a) treble damage cases, but do so slavishly without engaging in any analysis of the correctness of such a proposition. In *Mayer Paving*, a customer of a quarry operator complained of sales to

it and other Illinois purchasers of such materials. The jury returned a plaintiff's verdict for $498,204, but the district court entered judgment n.o.v. for defendant on the grounds that plaintiff did not compete with the Indiana contractors, and there were thus no interstate sales to compare. *Id.* at 766, 772. Justice Clark dissented. *Id.* at 772-75.

The court reasoned: (1) there was insufficient evidence to find that plaintiff was in competition with the Illinois contractors, and, therefore, (2) plaintiff could not have been damaged by the discriminatory sales to the Indiana contractors, and, therefore, (3) the purchases by plaintiff could not have "injure[d] competition," and (4) the Indiana purchases in commerce were not "purchases involved" under the language of § 2(a), and, therefore, (5) the jurisdictional requisite of an interstate sale was not met.

The first question is why the court reached the jurisdictional issue to begin with. If plaintiff was not in competition with the Indiana purchasers, it could not have proved damages. This is as far as the court needed to have gone to set aside the verdict for plaintiff. But, even if the court had gone further and found that plaintiff had not proved an effect on competition, that, again, should have been the end of the matter. The majority's reason for going all the way around the horn to reach out and decide the case on jurisdictional grounds is a mystery.

The majority admitted that there was no case law which supported its resolution of the case on jurisdictional grounds, and sought its sole support in Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962). In fact, that treatise is quite contrary to the majority's rationale.

The Seventh Circuit first relied on Rowe for the undisputed proposition that "'the applicability of Robinson-Patman is determined by this rule of thumb: at least one of the two transactions which, when compared, generate a discrimination must cross a

state line.'" *Mayer Paving*, 486 F.2d at 766. This statement is found in § 4.9 at 78-79. This subsection, titled "Interstate Commerce," is found in Chapter 4, Jurisdictional Requirements of the Robinson-Patman Act, Section "E. The 'Commerce' Requirement." Rowe makes no mention of "sales to competing purchasers" on either page 78 or page 79.

The *Mayer Paving* majority's second reference to Rowe is "See also Rowe, Price discrimination, supra," in support of the proposition that the "distinction" between "primary line injury" cases and "secondary line injury" cases "is well-established" and "has substantial impact on the disposition of the present case." *Mayer Paving*, 486 F.2d at 768. If the "*supra*" is a reference to the entire treatise, it is meaningless as support for the result reached by the *Mayer Paving* majority.

The third reference to Rowe found in *Mayer Paving* is as follows: "The analytical distinction involving the 'competing customer' is discussed in Rowe, Price Discrimination, *supra* at 80." *Mayer Paving*, 486 F.2d at 770. The only reference to "the 'competing customer'" at page 80 of Rowe's treatise is: "In a case concerning a seller's discriminations allegedly detrimental to competition at the customer level, the Act applies whether the seller located in State A quotes a lower price to a customer within State A than he asks of a competing customer in State B; or, conversely, whether the seller in State A charges the customer in his home state a higher price than the out-of-state purchaser." Rowe, *supra* at 80.

In support of the above sentence, Rowe says "Cf. Also Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150, 152-53 (2d Cir. 1949)." Rowe, *supra* at 80. n.148. *Sun Cosmetic* involved a claim under § 2(e) of the statute, not 2(a). The question therein, which the court answered in the affirmative, was "whether it was an actionable wrong to deny the plaintiff, whose business is altogether intrastate, a favor which

the defendant granted to 'agencies' in other states ...." *Sun Cosmetic*, 178 F.2d at 152.

Rowe's use of the phrase "competing customer" was incidental to the example given of when there would be a sale in interstate commerce for jurisdictional purposes, as indicated by the fact that the case cited related to the issue of whether an interstate sale at a discriminatory price gave rise to a cause of action to a plaintiff whose "business is altogether intrastate" — an inquiry which did *not* delve into the issue of whether the interstate sale was to a competitor of plaintiff.

The final reference to Rowe in *Mayer Paving* is: "'For to the extent customers on different sides of a boundary line do not compete with each other, no adverse competitive effects on the customer level can ensue from the supplier's price variations.' Rowe, *Price Discrimination*, *supra* at 179." *Mayer Paving*, 486 F.2d at 770.

This quotation is *not* found in Rowe's chapter on "Jurisdictional Requirements of the Robinson-Patman Act"; rather, it is located in a chapter on "Competitive Injury." The fact that Rowe discussed the issue of competing customers in this chapter, and not in the chapter on jurisdiction, demonstrates that Rowe in fact offered no support to the majority's decision in *Mayer Paving*.

Thus, contrary to Petitioner's representations, there was no "unanimity previously existing on this issue," and there was a "basis in federal case law" for the Eighth Circuit's decision. The bottom line is that there have been only two cases[3] whose results have turned on this issue in the 85-year history of the Robinson-Patman Act. This is not a "burning issue" which cries out for immediate resolution by this Court.

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[3] or three cases, if the footnote in *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 880-81 n.13 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983), opinion after remand, 594 F. Supp. 1022, 1034-1035 (N.D. Cal. 1984), is counted.

As Petitioner correctly states, this is a "secondary line injury" case. (Petition 2-3.) This Court has ruled that it is *not* necessary to show competition between favored and disfavored purchasers in "primary line injury" cases: "The existence of competition among buyers who are charged different prices by a seller is *obviously important* in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned." *Anheuser-Busch, Inc.*, 363 U.S. at 546. The statute does not speak of "primary-line" or "secondary-line" injury or competition. Neither Petitioner nor the court in *Mayer Paving* has pointed to any language in the statute which justifies placing a jurisdictional hurdle of proof of competition between favored and disfavored purchasers in a secondary-line case, where no such hurdle exists in a primary-line case.

Moreover, this case does not present an appropriate factual setting for resolution of this issue. Petitioner argues that: "Where, as here, the distributors of a product have exclusive territories, they do not, by definition, compete with each other, and therefore sales to them at different prices cannot possibly be said 'substantially to lessen competition,' as required by § 2(a). *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584-86 (2d Cir. 1987)(no reasonable juror could find competition where plaintiff had exclusive territory)."[4] (Petition 6.)

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[4] Petitioner's citation of *Best Brands* undercuts its principal thesis. Falstaff won the case on a jury verdict, not on the grounds of lack of subject-matter jurisdiction. The Second Circuit treated competition between favored and disfavored purchasers as proof relevant to the element of effect on competition, not as a jurisdictional prerequisite. *See* the Eighth Circuit's opinion herein, Petition at A-7. *Also see White Industries., Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687 (W.D. Mo. 1986), *aff'd*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Stelwagon Mfg. Co. v. Tarmac Roofing*, 63 F.3d 1267, 1271 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996), and the Eighth Circuit's discussion of these cases reprinted on pages A-7 to A-8 of the Petition.

Best Brands Beverage, Inc. was a "master distributor" who sold to wholesalers with fixed locations in its territory, who, in turn, sold to retailers located within Best Brands' territory. Thus, Best Brands and the favored master distributor did not in fact solicit or sell to the same customers. In the instant case, Respondents and the favored branch dealers operate about 2,000 retail "points of sale" through vending machines, and seek the custom of every potential newspaper reader in the Greater St. Louis Metropolitan Area. In this regard, Respondents are no different from any other retailers who sell from fixed locations, such as service stations, groceries, liquor stores, fast-food restaurants, florists, convenience stores, etc. All that Respondents need show is that they sell newspapers in the same geographic market as the favored branch dealers. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 794 (10th Cir. 1970); *McCormack v. Theo. Hamm Brewing Co.*, 284 F. Supp. 158, 162-63 (D. Minn. 1968); *Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176, 182 (D.N.M. 1966); Wright Patman, *The Robinson-Patman Act* 53 (1938); 4 Julian O. Von Kalinowski, Peter Sullivan & Maureen McGwire, *Antitrust Laws & Trade Regulation* §§ 39.02[1] at 39-14, 39-16, 39.02[2] at 39-25 to 39-26, 39.02[3] at 39-27.[5] Even the district

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[5] The illogic of Petitioner's position may be illustrated by a hypothetical. Branch boundaries coincide with streets. Suppose that the northern boundary of disfavored branch dealer A is the southern side of Main Street, and the southern boundary of favored branch dealer B is the north side of Main Street. Fifth Street runs in a north-south direction through both branches. Branch dealer A has a vending machine on the southeast corner of Fifth and Main, and branch dealer B has a vending machine on the northeast corner of the same intersection. Customer C lives on Fifth Street in branch dealer A's territory. As he heads north to work in the morning, C may stop at the first vending machine he sees to purchase a St. Louis Post-Dispatch. However, if that vending machine is empty, or malfunctions, he may then drive across Main and purchase a newspaper from branch dealer B's vending machine. According to Petitioner's thesis, since all of A's vending machines are located in A's

Footnote 5 continued on the next page.

judge in the instant case recognized that "if customers located in a plaintiff's branch service area are likely to buy the Post-Dispatch in another branch service area, the two branch dealers may be viewed as competitors." (Petition A-16.)

Finally, Petitioner engages in hyperbole which is extreme even for a lawyer: "The unprecedented holding below . . . mandates a monumental[6] waste of judicial resources over cases that should be declared jurisdictionally stillborn." (Petition 5.) The Eighth Circuit had an answer for this: "It may be that appellants will be unable to prove any competitive relationship, and consequently, no competitive harm. . . . Should the issue of a lack of competitive relationship between favored and disfavored branch dealers present itself in the future, for example as part of a motion for summary judgment, the district court would then review the evidence under a different standard." (Petition A-9.)

The only significant logistical difference between Petitioner's proposed remedy for lack of proof of competition between favored and disfavored purchasers, and that suggested by the Eighth Circuit Court of Appeals, is that, in the latter case, Respondents will be entitled to discovery on the case as a whole, whereas, to date, Respondents have been limited to discovery on

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Footnote 5 continued from the previous page.

branch, and all of B's vending machines are located in B's branch, "they do not, by definition, compete with each other." (Petition 6). This is not logical. Furthermore, since B pays less for the St. Louis Post-Dispatch than A, he can use the extra capital to buy another delivery truck, hire another driver, lease another vending machine, etc., to make sure that he has newspapers available for C to purchase when A does not.

[6] Syn: "vast, immense, prodigious, stupendous, enormous, huge, colossal . . . ; cosmic, astronomical, mammoth." Peter M. Roget, International Thesaurus § 34.11 (3d ed. 1962).

the jurisdictional issue presented herein. The only "judicial resources" involved would be resolution of discovery disputes, if any. Using this Court's critical judicial resources to save the judicial resources involved in resolution by a district court of discovery issues would be wasteful indeed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.